

**FILED**

MAR - 2 2004

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

SKULL VALLEY BAND OF GOSHUTE INDIANS )

3359 S. Main Street )

Box 808 )

Salt Lake City, UT 84114; and )

LEON D. BEAR )

Chairman of the Skull Valley Band )

of Goshute Indians, )

416 Skull Valley Road )

Skull Valley, UT 84029 )

Plaintiffs, )

v. )

SECRETARY OF THE INTERIOR )

GALE NORTON, IN HER OFFICIAL CAPACITY )

1849 C Street, N.W., Washington, D.C. 20240; )

DEPUTY SECRETARY OF THE INTERIOR )

STEPHEN GRILES, IN HIS OFFICIAL CAPACITY )

1849 C Street N.W., Washington, D.C. 20240; )

and )

UNITED STATES DEPARTMENT )

OF THE INTERIOR, )

1849 C Street NW, Washington, DC 20240 )

Defendants. )

CASE NUMBER 1:04CV00339

JUDGE: Colleen Kollar-Kotelly

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 03/02/2004

COMPLAINT  
(Freedom of Information Act)

1. This is a lawsuit brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and other laws, to compel officials of the U.S. Department of the Interior to disclose records of secret meetings and other communications with Utah political leaders, including former Utah Governor Mike Leavitt, Members of the Utah delegation to Congress, and others, concerning a lease of tribal land owned in trust by the United States for the Skull Valley Band of Goshute Indians, a small Indian tribe with a reservation in the West Desert of Utah.

## PARTIES

2. Plaintiff SKULL VALLEY BAND OF GOSHUTE INDIANS is a federally-recognized Indian Tribe. It owns beneficial title to an Indian reservation set aside pursuant to the Treaty of October 12, 1863, between the United States and the Goshute Indians.

3. Plaintiff LEON D. BEAR is the Chairman of the Executive Committee of the Skull Valley Band of Goshute Indians.

4. Defendant GALE NORTON is the Secretary of the Interior. She is sued in her official capacity.

5. Defendant STEPHEN GRILES is the Deputy Secretary of the Interior. He is sued in his official capacity.

6. Defendant, the UNITED STATES DEPARTMENT OF THE INTERIOR, is an agency within the meaning given in the Freedom of Information Act, 5 U.S.C. §552.

## JURISDICTION

7. This Court is conferred with jurisdiction over this action by 5 U.S.C. §552(a)(4)(B), 5 U.S.C. § 702, and 28 U.S.C. § 1331.

## BACKGROUND

8. Plaintiff Skull Valley Band of Goshute Indians entered into a business lease of its reservation lands with Private Fuel Storage L.L.C. (PFS) in December 1996. This lease was amended in May 1997, and then approved by the Superintendent of the Bureau of Indian Affairs (BIA) pursuant to 25 U.S.C. § 415, on May 23, 1997. The purpose of the lease is the temporary storage of spent nuclear fuel rods from civilian nuclear reactors throughout the United States. The lands which are the subject of that

lease are held in trust by the United States for the benefit of the Skull Valley Band. The Band will receive millions of dollars in compensation for the lease, if the storage project is constructed, and when spent nuclear fuel rods are delivered to the storage site on the Skull Valley Reservation. In addition, the Band will benefit from the creation of jobs and infrastructure on the Reservation, which currently has no viable economic enterprise.

9. The PFS lease requires the issuance of a license from the Nuclear Regulatory Commission (NRC) before construction may begin on the storage site. PFS applied for such a license in June 1997. Those licensing proceedings are pending. A final decision on a license is expected to be made during 2004. Under the terms of the lease, PFS may not construct or operate the storage facility until the Secretary of the Interior certifies that certain conditions have been met, including the issuance of an NRC license. Thus, the principal benefits of the lease, to be gained by the Skull Valley Band, will not be realized until after those conditions have been met, and certified by the Secretary of the Interior.

10. Immediately after the PFS lease was approved by the BIA Superintendent, Governor Mike Leavitt of Utah declared his opposition to the PFS storage project, the lease, and the license application. He said that spent nuclear fuel rods would be delivered to the Skull Valley Reservation "over my dead body."

11. Under Governor Leavitt's direction, the State of Utah initiated a program called Opposition to High Level Nuclear Waste (HLNW), and began to fund opposition efforts to thwart the PFS Project and lease, including the funding of the creation of an entity known as Ohngo Gaudadeh Devia (OGD), supposedly an Indian environmental organization, led by political opponents of Chairman Leon D. Bear within the Skull

Valley Band. Since 1997 the State of Utah has paid the attorney fees for OGD, and for individual members of the Skull Valley Band, who are political opponents of Chairman Leon D. Bear, to enable this minority dissident group to file lawsuits and administrative appeals in opposition to the PFS Project and the leadership of the Skull Valley Band.

12. In 1998 Governor Leavitt announced that he would build a "moat" around the Skull Valley Reservation to prevent the transportation of spent nuclear fuel rods to the PFS storage site. Between 1998 and 2001 the Utah Legislature passed numerous laws designed to block access to the Skull Valley Reservation and to prohibit the storage or transportation of spent nuclear fuel rods in the State of Utah, including the Skull Valley Reservation. In 2001, the Skull Valley Band and PFS filed suit against Governor Leavitt and others to declare this state legislation unconstitutional. A decision favorable to the plaintiffs was issued by U.S. District Judge Tena Campbell in July 2002, and an appeal is pending in the U.S. Court of Appeals for the Tenth Circuit. Skull Valley Band of Goshute Indians v. Leavitt, 212 F.Supp. 1232 (D.Utah 2002).

13. As part of the HLNW program, the State of Utah and OGD have filed lawsuits against the Department of the Interior challenging the PFS lease. Utah and OGD have also filed contentions in opposition to the issuance of a license to PFS in proceedings before the NRC. OGD and Utah have also filed Petitions for Review in the U.S. Court of Appeals for the D.C. Circuit, challenging an NRC decision issued on December 18, 2002. Bullcreek and Utah v. NRC, Nos. 03-1018 and 03-1022. These efforts were all funded by the State of Utah. On February 24, 2004, the D.C. Circuit denied those Petitions for Review.

14. Members of the Utah Congressional delegation have also undertaken efforts to block access to the Skull Valley Reservation, by introducing legislation, or by offering amendments to legislation, which would prevent the Department of the Interior from issuing rights-of-way across public lands surrounding the reservation. These efforts continue. All five current members of the Utah delegation to Congress have requested the Secretary of the Interior to withdraw the approval of the PFS lease.

15. As detailed below, Governor Leavitt, members of his immediate staff and other employees of the State of Utah; Members of the Utah Congressional delegation, and members of their staffs; tribal dissidents opposed to the PFS lease and the leadership of the Skull Valley Band, and their attorneys, including attorneys funded by the State of Utah; have all met with high-ranking officials of the Department of the Interior, and/or have otherwise communicated with these officials, in efforts to prevent the construction and operation of the PFS storage project.

16. On September 10, 2002, Neal McCaleb, then the Assistant Secretary of the Interior for Indian Affairs, met with the Executive Committee of the Skull Valley Band at their offices in Salt Lake City, Utah, to explore "alternatives" to the PFS storage project because he was concerned that the project had become "marginalized". He asked the Band to provide him with the "elements" which would be required for the Band to consider an alternative to the PFS Project. He said he was not asking the Band to abandon its lease with PFS. He requested that the discussions between the Department and the Band be kept "confidential".

17. By letter of October 1, 2002, the Executive Committee of the Skull Valley Band transmitted to Assistant Secretary McCaleb an outline of the elements of alternative

economic development for the Reservation, in response to his request. Officials and representatives of the Band kept this communication confidential, as requested by the Assistant Secretary. The letter emphasized that the Band was not prepared to abandon its lease with PFS.

18. By letter of March 27, 2003, Deputy Secretary Stephen Griles purported to respond to the October 1, 2002, letter from the Executive Committee of the Band, making a so-called "counterproposal" to the Band, which stated that certain "commitment[s]" had been made to the Band by Governor Leavitt.

19. The Band's Executive Committee responded to Defendant Griles' letter with their reply of April 15, 2003, protesting that his letter had mischaracterized the discussions between the Executive Committee and Assistant Secretary McCaleb. However, prior to the Department's receipt of that reply, on April 18, 2003, the Skull Valley Band began receiving inquiries from the press, indicating that the Department of the Interior had released the letters of October 1, 2002, and March 27, 2003, to the media, in violation of the understanding of confidentiality with Assistant Secretary McCaleb, which he had requested.

#### MEETINGS AND OTHER COMMUNICATIONS WITH OPPONENTS

##### OF THE SKULL VALLEY BAND/PFS LEASE

20. On information and belief, employees of the Department of the Interior met and/or spoke with Duncan Steadman, an attorney who has represented dissident members of the Skull Valley Band opposed to the PFS lease, during an Indian Energy Summit in December 2001. Mr. Steadman had been under contract with the State of Utah to represent opponents of the lease. In December 2003 he was indicted by a federal

grand jury in Utah for bank fraud and for stealing tribal funds of the Skull Valley Band in October 2001.

21. On information and belief, during the Winter Olympics in Utah in February 2002 Governor Mike Leavitt spoke with White House officials about his opposition to the Skull Valley Band lease with PFS. During that same time period Gov. Leavitt met with Defendant Griles regarding that lease.

22. On or about April 23, 2002, the Solicitor of the Department of the Interior, William Myers, met with attorney Larry EchoHawk and others regarding their opposition to the Skull Valley Band lease with PFS. Mr. EchoHawk and his law firm have been receiving approximately \$100,000 per year from the State of Utah to represent OGD and other tribal dissidents to oppose the PFS lease with the Skull Valley Band.

23. On information and belief, during the summer of 2002, U.S. Senators Orrin Hatch and Gordon Bennett met, or otherwise communicated, with officials in the Executive Office of the President, and with Secretary of Energy Spencer Abraham regarding their opposition to the PFS lease.

24. During the summer of 2002, U.S. Representative James V. Hansen of Utah, then the Chairman of the House Resources Committee, and/or members of his staff, met and/or otherwise communicated with Interior Department officials, possibly including Defendants Norton and Griles, regarding the PFS lease on the Skull Valley Indian Reservation. In May 2002 Mr. Hansen had successfully added an amendment to the Defense Authorization bill for 2002, prior to its passage by the House of Representatives, which amendment would have prohibited the issuance of any rights-of-

way across public lands providing access to the Skull Valley Reservation, unless the concurrence of the Governor of Utah had been obtained.

25. On information and belief, during the summer of 2002, Representative Hansen met with, and/or otherwise communicated, with officials of the Executive Office of the President, including the Director of the Office of Management and Budget (OMB), regarding his opposition to the PFS lease on the Skull Valley Indian Reservation. The Director of OMB, Mitchell Daniels, sent a letter to Rep. Hansen on September 10, 2002, expressing support for his amendment to the Defense Authorization bill. This was the same day that the Skull Valley Band Executive Committee was meeting with Assistant Secretary McCaleb regarding the PFS lease, as alleged in Paragraph 16, above.

26. On or about February 20, 2003, Larry EchoHawk and Utah Special Assistant Attorney General Monte Stewart met with officials of the Department of the Interior regarding the Skull Valley Band lease with PFS. Mr. Stewart was at that time Governor Leavitt's principal attorney in charge of litigation over the PFS lease and NRC license application. He was hired by the State in 2001 to defend the Skull Valley Band's lawsuit challenging the constitutionality of state legislation which would have prohibited the PFS Project. This lawsuit is referred to in Paragraph 12, above.

27. On or about February 23, 2003, Governor Leavitt met with Defendant Norton, and/or other officials of the Department of the Interior, regarding the Skull Valley Band/PFS lease. At that meeting, on information and belief, the participants discussed the Department's communications with the Skull Valley Band regarding the lease, which occurred between September 10 and October 1, 2002.



28. On information and belief, on more than one occasion during March 2003 Gov. Leavitt, and/or his staff, communicated with officials of the Department of the Interior regarding the Skull Valley Band lease with PFS. One or more drafts of a letter to Plaintiff Bear, from the Department, were shared with Gov. Leavitt and/or his staff, including his Chief Counsel Gary Doxey. These drafts led to the letter of March 27, 2003, to Plaintiff Bear from Defendant Griles, as alleged in Paragraph 18, above.

29. On information and belief, during March and April 2003 members of the Utah Congressional delegation and/or members of their staffs communicated with officials of the Department of the Interior regarding their opposition to the PFS lease. They transmitted an unsigned April 11, 2003, memorandum to the Secretary of the Interior expressing their opposition to the PFS lease. By letter of April 22, 2003, all five members of the Congressional delegation demanded that the Secretary withdraw the BIA approval of the PFS lease pursuant to her "fiduciary obligation" to the Skull Valley Band.

30. On or about May 19, 2003, Monte Stewart, and possibly others, met with officials of the Department of the Interior to express further opposition to the PFS lease.

#### FREEDOM OF INFORMATION ACT REQUEST

31. By letter of May 5, 2003, Plaintiff Bear, acting on behalf of plaintiff Skull Valley Band, submitted a Freedom of Information Act request to the Secretary of the Interior, requesting disclosure of "[a]ll records of communications since January 1, 2001 (including formal and informal correspondence, unsigned briefings, e-mail communications, and notes of telephone conversations)", in various offices in the headquarters of the Department of the Interior, regarding the PFS Project and lease; and "[r]ecords of all such communications (1) with the Governor of Utah, any persons on his

staff, or anyone communicating on his behalf ...; (2) with current or former members of the Utah Congressional Delegation, or their staff, or anyone communicating on their behalf; (3) with the White House, or the Office of Management and Budget, or otherwise from the Executive Office of the President, including copies of communications between Utah state officials, the Utah Congressional Delegation, and the Executive Office of the President, which are in the custody of the Department of the Interior; (4) with the Department of the Energy ...; (5) with the Department of Defense ...; and (6) with individual members of the Skull Valley Band, representatives of [OGD], or attorneys representing either OGD or these individual members of the Band ....”

32. By letter of July 14, 2003, the Department of the Interior provided its initial response to the Band’s FOIA request, which included copies of certain documents. By letter of August 5, 2003, the Department responded further to the FOIA request, providing a second installment of copies of records to the Band. However, both responses withheld important records, and deleted portions of those records, on the ground that they were “inter-agency or intra-agency memorandums or letters” exempt from disclosure under 5 U.S.C. § 552(b)(5). Among the documents withheld were records containing information on the various meetings and communications described above in Paragraphs 20-30, and also drafts of the March 27, 2003, letter to Plaintiff Bear, even though these drafts were shared with other persons outside the Department of the Interior.

33. By letter of February 3, 2004, the Department of the Interior provided a third response to the Band’s FOIA request of May 5, 2003, attaching three documents from the Office of the Inspector General.

34. By letter of September 16, 2003, Plaintiff Bear, on behalf of Plaintiff Skull Valley Band, timely appealed from the withholding of documents by the Department pursuant to its letters of July 14 and August 5, 2003. This FOIA appeal was assigned the number FOIA 2003-244 by the Department.

35. Under 5 U.S.C. § 552(a)(6)(A)(ii), Defendants should have made a determination with respect to Plaintiffs' administrative appeal in October 2003. On the date of the filing of this Complaint, more than four months after the statutory deadline, Defendants had still failed to respond to Plaintiffs' administrative appeal.

#### FIRST CLAIM FOR RELIEF

36. Plaintiffs reallege and incorporate herein the allegations in Paragraphs 1-35.

37. Defendants have failed to respond to Plaintiffs' administrative appeal of September 16, 2003, within the time prescribed in 5 U.S.C. § 552(a)(6)(A)(ii).

#### SECOND CLAIM FOR RELIEF

38. Plaintiffs reallege and incorporate herein the allegations in Paragraphs 1-37.

39. Defendants have unlawfully withheld and refused to disclose records, including reasonably segregable portions thereof, on communications between Executive Branch officials and persons outside of the Executive Branch, which records are within the scope of Plaintiffs' Freedom of Information Act request of May 5, 2003, in violation of the Freedom of Information Act, 5 U.S.C. § 552.

### THIRD CLAIM FOR RELIEF

40. Plaintiffs reallege and incorporate herein the allegations in Paragraphs 1-39.

41. Defendants have a trust responsibility to Plaintiff Skull Valley Band for the lands subject to the lease between the Skull Valley Band and PFS, under 25 U.S.C. §415 and other statutes, and the Treaty of October 12, 1863.

42. Defendant Griles' letter of March 27, 2003, to Plaintiff Bear stated that "final approval of the [PFS] Project is pending before the Department."

43. Defendants' repeated meetings and communications with political opponents of the PFS Project, without Plaintiffs' knowledge, have enabled those opponents to oppose, and to delay further, the completion of the agency approvals of the Project. This is a denial of Plaintiffs' rights to due process of law under the Fifth Amendment to the Constitution.

44. The Department's repeated meetings and communications with political opponents of the PFS Project since 2001, with the concomitant failure to advise the Skull Valley Band of these meetings and communications, and the continued refusal to disclose to Plaintiffs the records of the meetings, or to share information on these meetings and communications, violates the Administrative Procedure Act, 5 U.S.C. § 706, in that this conduct is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

45. By failing to abide by understandings reached at the September 10, 2002, meeting between the Assistant Secretary for Indian Affairs and the Executive Committee of the Skull Valley Band on the subject of the PFS lease, including the confidentiality of

those discussions, and by then withholding records and information from the Skull Valley Band regarding secret communications with political opponents of the PFS lease, Defendants have treated Plaintiffs unfairly and have violated their trust responsibility to the Skull Valley Band.

PRAYER

WHEREFORE, Plaintiffs pray that this court:

- (1) To compel Defendants to disclose the records withheld from Plaintiffs' Freedom of Information Act request of May 5, 2003.
- (2) To declare that Defendants may not secretly communicate with political opponents of Plaintiffs' lease with PFS without promptly advising Plaintiffs of those communications.
- (3) To enjoin Defendants from secretly communicating with political leaders of the State of Utah, and political opponents of the leadership of the Skull Valley Band, regarding the lease between the Skull Valley Band and PFS, without notifying Plaintiffs of these communications, and without sharing with Plaintiffs the substance of those communications, and the information obtained from those communications.
- (4) To award Plaintiffs their attorney fees and reasonable costs, and such other relief as is just and proper.

Respectfully submitted,



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